

STATE OF MICHIGAN
COURT OF APPEALS

GORDON WILLFORD, Individually and Next
Friend of HEATHER WILLFORD, Minor,

UNPUBLISHED
August 2, 2011

Plaintiff-Appellee,

V

CATHERINE THORINGTON, Guardian of
TRAVIS THORINGTON,

No. 298899
Gladwin Circuit Court
LC No. 07-003280-NO

Defendant-Appellant.

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's denial of attorney fees as costs pursuant to MCR 2.405. Because the trial court correctly concluded that the present case involved an issue of first impression, it was not an abuse of discretion to determine that the interest of justice exception was applicable in the instant case and accordingly deny defendant's request to include reasonable attorney fees as part of the actual costs awarded pursuant to MCR 2.405. We affirm.

The following facts were set forth in our initial review of this matter in *Willford v Thorington (Willford I)*, unpublished per curiam opinion of the Court of Appeals, issued December 1, 2009, (Docket No. 287909):

This suit arises from an injury that high school freshman Heather Willford sustained on October 24, 2005, during a soccer game that occurred during a physical education class at her school. The class had been divided into several teams, and Heather was on the field with her team when classmate Travis Thorington ran onto the field to kick the ball away from her. He missed the ball and connected with Heather's knee, breaking her femur. There is no evidence that he had any intent other than to kick the ball. [*Id.*, unpub op at 1.]

In *Willford I* this Court reviewed the trial court's denial of defendant's motion for summary disposition and ultimately reversed the trial court's decision after concluding that the trial court's definition of "participant" had been overly narrow. *Id.*, unpub op at 3. Upon remand, defendant moved for taxation of costs pursuant to MCR 2.405, given that an offer of judgment in the amount of \$1,000 had been proffered, and rejected by non-response, at that outset of the case. Following a hearing, the trial court concluded that defendant was entitled to

\$40 in costs under the court rule, but declined to also award reasonable attorney fees based upon its determination that the interest of justice exception provided for by MCR 2.405(D)(3) was applicable here.

We review a trial court's decision whether to award attorney fees pursuant to MCR 2.405 for an abuse of discretion. *Windemere Commons Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). In addition, the interpretation and application of the offer of judgment rule is reviewed de novo. *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007).

"The purpose of MCR 2.405 is 'to encourage settlement and to deter protracted litigation.'" *Hanley v Mazda Motor Corp*, 239 Mich App 596, 603; 609 NW2d 203 (2000), quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 31; 555 NW2d 709 (1996). MCR 2.405(D) provides in pertinent part, that if an offer of judgment is rejected, costs are payable as follows: "(1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action." Actual costs include "a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6). However, the court rule provides a trial court with discretion to decline to impose attorney fees under an exception for the "interest of justice." MCR 2.405(D)(3). As noted above, the trial court relied on this exception in denying defendant's request.

This Court has held that the award of attorney fees under the offer of judgment rule should be the normal outcome absent unusual circumstances. *Luidens*, 219 Mich App at 32. Examples of cases involving "unusual circumstances" warranting the application of the interest of justice exception include those that involve a legal issue of first impression, "where the law is unsettled and substantial damages are at issue," or in a case involving an issue of public interest. *Haliw v City of Sterling Hts (On Remand) (Haliw II)*, 266 Mich App 444, 448-449; 702 NW2d 637 (2005), quoting *Luidens*, 219 Mich App at 35-36 (internal quotation omitted).

Here, the trial court concluded that the underlying issues constituted an issue of first impression, as well as a matter of public concern. In reaching this determination, the trial court noted that no published case had yet decided whether a member of a gym class constituted a "participant" as discussed in *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999). The trial court also observed that the *Willford I* panel looked to the dictionary to determine the correct definition of a participant. We agree that this was persuasive evidence that the underlying issues in this case were a matter of first impression.¹ Accordingly, the trial

¹ Alternately, given the stated medical bills of \$26,783.77, and the even larger mediation award, this case could be fairly said to consist of one "where the law is unsettled and substantial damages are at issue." Indeed, we further note that this Court's earlier decision in the instant case still leaves unresolved the underlying question of whether a member of a physical education class should always be held to the same standard as other, voluntary, participants in other venues with respect to the assumption of risk as outlined in *Richie-Gamester*.

court's finding that the interest of justice exception was applicable in the instant case was not an abuse of discretion.²

Because we find that the trial court did not abuse its discretion in determining that defendant was not entitled to attorney fees under the circumstances of this case, we decline to address defendant's argument that the trial court abused its discretion by challenging the amount of fees requested.

Affirmed.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens

² Defendant disputes the trial court's conclusion that this case involved an issue of first impression and relies on the fact that our Supreme Court declined plaintiff's application to review the Court of Appeals decision in *Willford I*. However, the fact that the Supreme Court declined to review the result in *Willford I* does not necessitate the conclusion that the issues contained therein were not issues of first impression. To the contrary, our Supreme Court's denial of leave to appeal "means that the Supreme Court expresses no present view with respect to the legal questions dealt with in the opinion of the Court of Appeals." *Frishett v State Farm Mut Automobile Ins Co*, 378 Mich 733, 734 (1966).